

EXHIBIT P

WILLENKEN WILSON LOH & STRIS LLP

COUNSELORS AT LAW

707 WILSIRE BOULEVARD, SUITE 3850

LOS ANGELES, CALIFORNIA 90017

TEL: 213-955-9240 FAX: 213-955-9250

www.willenken.com

VIA ELECTRONIC & U.S. MAIL
appeals@sl.universalservice.org

October 7, 2005

Letter of Appeal
USAC
Schools & Libraries Division
Box 125 – Correspondence Unit
80 South Jefferson Road
Whippany, NJ 07981

Re: *Appeal of August 10, 2005 Notification of Improperly Disbursed Funds Letter regarding Funding Request Nos. 238460 and 238465 to Premio Computer, Inc.*

Dear USAC Schools & Libraries Division:

This letter is an appeal by Premio Computer, Inc. ("Premio") of the August 10, 2005 Notification of Improperly Disbursed Funds Letter regarding Funding Request Numbers ("FRNs") 238460 and 238465, which is attached hereto as Exhibit A (hereinafter the "Decision").

Exhibit A reflects the following information, *see* Ex. A--002, which the following page of Exhibit A states must be included in this appeal:

Applicant Name:	LOS ANGELES UNIFIED CLUSTER 07
Form 471 Application No.:	143513
Billed Entity No.:	143565
FCC Registration No.:	[None listed]

My firm, Willenken Wilson Loh & Stris, LLP, represents Premio in this appeal. Along with my colleague, Elizabeth I. Rogers, I am the person who can most readily discuss this appeal with you. I am authorized to sign this appeal letter on Premio's behalf.

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Our contact information is:

Paul J. Loh, Esq.
paulloh@willenken.com
Elizabeth I. Rogers, Esq.
elizabethrogers@willenken.com
Willenken Wilson Loh & Stris, LLP
707 Wilshire Boulevard
Suite 3850
Los Angeles, CA 90017
(MAIN TEL) (213) 955-9240
(FAX) (213) 955-9250

In this appeal, Premio contends that USAC's Decision to recover from Premio a total of \$1,527,769.02¹ in previously disbursed E-rate funds was improper for the following three reasons:

- 1) The Decision contravenes the administrative statute of limitations set forth in *In re Schools and Libraries Universal Service Support Mechanism*, Federal Communications Commission Order No. 04-190 (Adopted: August 4, 2004; Released: August 13, 2004) (hereinafter the "August 4, 2004 FCC Order");
- 2) The Decision improperly fails to identify its legal basis;

¹ Premio calculated this amount based on the information contained in the Decision by adding the \$566,330.05 in "Funds to be Recovered from Service Provider" for Funding Request No. 238460 from Exhibit A, at 006 to the \$961,438.97 in "Funds to be Recovered from Service Provider" for Funding Request No. 238465 from page 007 of Exhibit A. This calculation was required because the Decision states only that Premio "is responsible to repay all or some of the funds disbursed in error," without clearly indicating the total amount of those funds. *See* Ex. A, at 002. For FRN 238460, the Decision states that of the \$895,541.05 in disbursed funds, only \$369,900.00 worth of servers, or 30 servers, were actually delivered. *Id.* at 006. Nevertheless, for reasons Premio does not understand, instead of ordering the recovery of \$525,641.05 (\$895,541.05 - \$369,900.00), the Decision ordered the recovery of \$566,330.05 for this FRN. ***This appears to be a typographical or mathematical error in the amount of funds ordered recovered for FRN238460.*** Premio contends that no funds should be recovered; however, in the alternative, Premio respectfully requests USAC to fix this error in calculation, or to explain why it is ordering the recovery of \$566,330.05 instead of \$525,641.05 for this FRN when \$369,900.00 worth of the \$895,541.05 of servers were actually accepted by LAUSD.

- 3) The Decision improperly concludes that Premio violated unspecified FCC rules even though Premio actually or constructively delivered all the servers it had contracted to deliver under FRNs 238460 and 238465;

These reasons are explained in greater detail below. Additionally, Premio respectfully requests that USAC exercise its authority to waive any rule violation it believes has occurred based on reasons unique to this case. Finally, to the extent USAC determines that any recovery of funds from Premio is warranted, that recovery should be reduced by \$716,638.40, which is the amount of E-rate funding USAC owes Premio for FRN 260296.

1. Statute of Limitations

The August 4, 2004 FCC Order established a five-year administrative limitations period for audits or other investigations by the FCC or USAC. *See* August 4, 2004 FCC Order, at 11-12. The Order stated:

Under the policy we adopt today, USAC and the Commission shall carry out any audit or investigation that may lead to discovery of any violation of the statute or a rule within five years of the final delivery of service for a specific funding year.

Id. at 12. The policy the FCC announced is that “we will initiate *and complete* any inquiries to determine whether or not statutory or rule violations exist within a five year period after final delivery of service for a specific funding year. *Id.* (emphasis added).

The Decision to recover funds from Premio was not made within this five-year limitations period. The Decision pertains to funds disbursed for “Funding Year 1999: 7/01/1999 – 6/30/2000.” *See* Ex. A, at 002. To comply with the August 4, 2004 FCC Order, USAC needed to complete audits or investigations of potential statutory or rule violations for the 1999 funding year on or before June 30, 2005.² The Decision at issue, which was completed and relayed to Premio on August 10, 2005, was not completed within that time. Accordingly, the Decision is untimely, and cannot properly be invoked to recover funds disbursed for Funding Year 1999 from Premio.

This is also not a case in which Premio engaged in any behavior that might justify a departure from the limitations period policy. It is undisputed, and the Decision found, that Premio actually delivered 30 of the 128 servers called for under the FRNs at issue. *See* Ex. A, at 006. Information provided to USAC during the investigation also confirmed that at all times Premio was—and remains—ready, willing, and able to deliver

² *See* March 6, 2000 Form 486 Notification Letter from USAC to Premio, attached hereto as Exhibit B, at 018 (stating “No payments will be made for services delivered. . .after the end of the funding year – June 30, 2000.”).

them to the E-rate applicant, the Los Angeles Unified School District ("LAUSD").³ However, on May 12, 2000, after Premio had submitted invoices for all of these servers to USAC and was in the process of installing them, LAUSD unexpectedly ordered Premio to suspend delivery. *See* Ex. C, at 060 (electronic mail from counsel for LAUSD to USAC stating "[a]s you know, the dispute over whether the remaining 90 computers/servers were satisfactory arose after the first 30 were delivered").

When it initially ordered the suspension of delivery, LAUSD indicated to Premio that it might accept the servers later; however based on LAUSD's continued refusal to accept the servers, after the passage of time, it became clear to Premio that LAUSD was, in fact, rejecting the servers. This rejection was improper. Accordingly, on February 14, 2003, Premio filed suit against LAUSD in Los Angeles Superior Court for breach of the E-rate contract.⁴

USAC initiated this investigation while that lawsuit was pending, apparently in response to a letter written by LAUSD on September 16, 2003.⁵ Premio explained the circumstances of the pending lawsuit to USAC, and repeatedly requested an expedited decision about whether USAC would seek to recover the E-rate funds disbursed for FRNs 238460 and 238465 from either party,⁶ as well as when USAC would pay Premio the

³ *See* Ex. C, at 0023-26; 029; 033; and 057. USAC's investigation in this case was comprised of discussions and correspondence with counsel for Premio and LAUSD. The correspondence was conducted primarily through electronic-mail. A series of this electronic-mail correspondence among and between counsel for Premio, LAUSD, and USAC is attached hereto as Exhibit C. Although Premio has not intentionally withheld or excluded any messages from this correspondence, it is not certain whether Exhibit C contains every electronic-mail message between or among the parties that formed the basis of USAC's investigation.

⁴ *See Premio Computer, Inc. v. Los Angeles Unified School District*, Case No. BC 290348.

⁵ A copy of this September 16, 2003 letter is attached hereto as Exhibit D. It references an earlier conversation in which a representative of LAUSD, Greg McNair, informed USAC (incorrectly, as LAUSD later admitted) that "while Premio submitted invoices and received payments on FRNs 238460 and 238465, LAUSD did not issue the appropriate purchase orders or receive goods or services under these FRNs." LAUSD subsequently recanted this representation when it became clear that LAUSD received 30 servers under FRN 238460. Ex. C. at 057. Exhibit D also states that "Premio did meet its obligations and provided LAUSD goods and services under FRN 260296," a statement which is correct, even though USAC has not yet paid for its share of these goods and services.

⁶ *See, e.g.,* Ex. C, at 023-26; 028-31; 038-50; 053-54; 057 (*LAUSD* recanting its earlier representation to the contrary, and confirming receipt of 30 servers).

approximately \$700,000.00 owed to Premio by USAC for FRN 260296, an FRN for the 2000 E-rate year contract between LAUSD and Premio.⁷

USAC's investigation was comprised primarily of discussions and correspondence with counsel for Premio and LAUSD during which USAC focused its inquiry on the issue of determining how many servers LAUSD received under FRNs 238460 and 238465.⁸ But despite Premio's cooperation and repeated requests, and despite the limited extent of its investigation, USAC did not render an expedited decision, nor did it conclude its investigation within the administrative limitations period. There is nothing about the present case that warrants any conclusion other than that the FCC policy imposing a five-year administrative limitations period should control.

2. Failure to Identify Legal Basis

USAC's Decision to recover the funds at issue from Premio was based on two determinations: 1) "that funds were improperly disbursed on this funding request" in violation of FCC rules, Ex. A, at 006 (regarding FRN 238460) and repeated at 007 (regarding FRN 238465);⁹ and 2) that an act or omission of Premio caused the violation, making Premio responsible to repay the funds disbursed in error, *id.* at 002, 006-7. The Decision improperly fails to identify the legal basis for either of these determinations.

The Decision fails to identify the legal basis for USAC's determination that the funds were improperly disbursed in violation of FCC rules because it does not indicate *which FCC rules* USAC found to have been violated. Instead, the Decision references unspecified "FCC rules," which "authorize USAC to disburse funds to service providers for providing supported services to eligible entities," *id.* at 006 and repeated at 007, and then states that "[t]hese rules are violated if the service provider receives payment for services and/or products that it did not deliver to the eligible entity," *id.*

⁷ See, e.g., Ex. C, at 027; 028-31; 032-33.

⁸ See generally Exhibit C, the progression of which shows that LAUSD did not respond promptly to USAC's inquiries, and that it was after Premio provided documentation corroborating its version of events, LAUSD recanted the (now admittedly inaccurate) accusation reflected in Exhibit D that Premio never tendered the 128 servers or delivered any equipment under the 1999 E-rate year contract at issue, which appears to have prompted USAC to initiate this investigation.

⁹ Pages 006 and 007 of Exhibit A contain identical statements of rationale. Accordingly, the statements are quoted only once in the text of this appeal, above. It should be understood that Premio is appealing the recovery of funds for both FRNs, *i.e.*, Premio is appealing the entire Decision and contends that no funds should be recovered by USAC from Premio for any E-rate contract.

Similarly, the Decision fails to identify the legal basis for USAC's determination that Premio is responsible for the rule violation. Without identifying any source of legal authority, the Decision asserted:

Since the services were invoiced via a SPI, this violation was caused by an act or omission of the service provider because the service provider is responsible for ensuring that it only receives support for services and/or products that it actually provides to its customers.

Id. at 5, and repeated at 6.

These deficiencies are fatal because the basis of agency action "must be clearly set forth." *Atchison, T. & S.F. Ry.*, 412 U.S. 800, 808 (1973). In *Recinos de Leon v. Gonzalez*, the Ninth Circuit reversed and remanded a Board of Immigration Appeals ("BIA") decision in part because it was unclear what legal standard or standards the agency had applied. 400 F.3d 1185, 1192-93 (9th Cir. 2005). The Court noted that:

the basis for an agency determination "must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action."

Id. at 1189 (quoting *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 196-97 (1947)); see also *Communications and Control, Inc. v. FCC*, 374 F.3d 1329, 1336 (D.C. Cir. 2004) ("[W]e cannot evaluate the reasonableness of an interpretation the Commission did not set forth.").

These well-established principles not only show why USAC's Decision cannot withstand judicial review—they also illustrate why the Decision has placed Premio in an unfair position for purposes of this appeal. Just as a court cannot "be expected to chisel that which must be precise from what the agency has left vague and indecisive," *Chenery II*, 332 U.S. at 197, Premio cannot be expected to have a fair chance to explain why USAC's decision is wrong or contrary to existing FCC rules and regulations without being provided with a specific legal basis for the alleged violation.

Premio believes that an examination of specific FCC rules and regulations will lead USAC to conclude that Premio did not violate any of them. However, in the alternative, Premio respectfully respects that if USAC denies this appeal, it explain the particular legal authority or authorities on which it relies (including citations to the pertinent regulations) to support the determination that Premio violated an FCC rule in connection with the disbursement of the funds at issue.

3. Improper Determination That Premio Violated Unspecified FCC Rules Despite Having Delivered All Servers, Actually or Constructively

USAC appears to have hinged its conclusion that funds were improperly disbursed on the fact that funds were disbursed for products that were not delivered. *See* Ex. A, at 5-6. But USAC's statement that "funds were disbursed for products and/or services that were not delivered," Ex. A at 006 and repeated at 007, is misleading. Premio tendered all 128 servers to LAUSD. It actually delivered 30 servers pursuant to FRN 238460, and constructively delivered the rest.

Premio repeatedly explained to USAC prior to the Decision that it tendered all the servers provided for under FRNs 238460 and 238465 to LAUSD. Ex. C, at 023-26. LAUSD agreed with this. *Id.*

Correspondence from counsel for LAUSD to USAC during the course of the investigation confirmed (after Premio provided documentation of schools in the district having accepted delivery of the first 30 servers) that LAUSD did not accept the remaining servers *because LAUSD disputed* whether they were satisfactory. Ex. C, at 057; 060. Consequently, USAC's determination that Premio failed to deliver 98 servers is not supported by the information Premio and LAUSD provided to USAC during its investigation. The only reason why fewer than 100% of the servers were "actually delivered" to LAUSD is that LAUSD refused to accept them all—Premio did "actually provide" them all.

The Decision does not address these facts. Rather, it implicitly concludes that Premio violated an unspecified FCC rule or rules *despite* having manufactured and tendered—*i.e.*, having constructively delivered—all the servers. *See* Ex. A, at 006 (stating that LAUSD and Premio were only able to verify that 30 servers "were *actually* delivered," for FRN 238460) (emphasis added), 007 (stating that they were unable to verify "that any of the servers were *actually* delivered" for FRN 238465) (emphasis added).

It is unreasonable to conclude that Premio's tender of the servers to LAUSD, and LAUSD's rejection of those servers—a rejection which Premio has always maintained, and continues to maintain, was wrongful—constitutes non-delivery by Premio. The conclusion that these facts can amount to an FCC rule violation for which *Premio* can be held responsible also defies governing FCC policy.

It a July 23, 2004 Order, the FCC established a policy of requiring recovery of erroneously distributed E-rate funds from "whichever party or parties has committed the statutory or rule violation."¹⁰ Previously, recovery was always directed to the service

¹⁰ *In re Federal-State Joint Board on Univ. Serv. Changes to the Board of Directors for the Nat'l Exchange Carrier Assn., Inc. Schools and Libraries Univ. Serv. Support Mech.*, FCC Docket Nos. 96-45, 97-21, 02-6 (Adopted: July 23, 2004; Released: July 30, 2004) (the "July 23, 2004 FCC Order"), at 1.

provider, who might then have a claim against the school or library for the recovered amount. The July 23, 2004 FCC Order recognized that in many instances, the school or library is the culpable party.¹¹

The July 23, 2004 Order directed USAC to determine from whom erroneously distributed funds should be recovered on a case-by-case basis.¹² The FCC ordered that:

In determining to which party recovery should be directed, USAC shall consider which party was in a better position to prevent the statutory or rule violation, and which party committed the act or omission that forms the basis for the statutory or rule violation.¹³

USAC failed to follow that policy here, because the Decision failed to consider which party was in a better position to prevent the violation. That party was LAUSD, who could have prevented the violation by accepting Premio's tendered delivery of the servers. This FCC policy was also violated because it was LAUSD's wrongful rejection, not any act or omission of Premio, which prevented LAUSD from physically receiving the servers.

The Decision seems to suggest that the responsibility for LAUSD's wrongful rejection of the tendered servers can be shifted to Premio because Premio, the service provider, issued invoices to USAC. It states:

Since the services were invoiced via a SPI, this violation was caused by an act or omission of the service provider because the service provider is responsible for ensuring that it only receives support for services and/or products that it actually provides to its customers.

Ex. A, at 006 and repeated at 007. But this is inconsistent with the FCC's policy stated in the July 23, 2004 FCC Order, because issuing the invoices no more caused the violation than did Premio's entry into the E-rate contract in the first place. The only act that proximately caused the disbursement of funds for servers that were not actually physically delivered was done by LAUSD.

If the violation is the disbursement of funds for products that were not actually physically delivered, no act or omission of Premio can properly be said to have caused it. To be sure, Premio issued invoices to USAC for the FRN 238460 and 238465 servers. These, six invoices are attached hereto as Exhibit E. As Exhibit E reflects, Premio issued these invoices on the following dates:

¹¹ *Id.* at 5.

¹² *Id.* at 6.

¹³ *Id.*

Date	Invoice Number	Amount
March 31, 2000	CA-040100	\$376,450.00
April 7, 2000	CA-040600	\$301,160.00
April 12, 2000	CA-041000	\$217,931.05
April 14, 2000	CA-041400	\$376,450.00
April 17, 2000	CA-041700	\$301,160.00
April 20, 2000	CA-042000	\$283,828.97

Premio had tendered the servers to LAUSD and was in the process of installing them when it issued the invoices to USAC. The invoices were all issued *before* LAUSD ordered Premio to suspend delivery on May 12, 2000. The LAUSD forms acknowledging receipt of the 30 accepted servers corroborate this time frame. *See* Ex. C, at 041 (corroborating receipt by Miltikan Middle School on 5/1/00); 044 (corroborating receipt by Van Nuys Middle School on 5/3/00).

Moreover, LAUSD must have confirmed to USAC that Premio had begun delivering the servers before Premio invoiced USAC. This is so because Premio did not invoice USAC until after it received the March 6, 2000 Form 486 Notification Letter from USAC. *See* Ex. B. That letter stated, in part, that Premio previously should have received funding commitment decisions letters, which:

explained that E-rate Applicants must file a Form 486 to confirm receipt of services approved for discounts. Once the Form 486 is properly filed, the SLD may start receiving invoices from service providers.

This "Form 486 Notification Letter" informs you that one or more Form(s) 486 listing your company as a service provider has been received by the SLD.

Id., at 016. This form 486 notification letter included FRNs 238460 and 238465. *Id.* at 022. Premio does not have a copy of the Form 486 submitted by LAUSD for these FRNs, and LAUSD initially denied having submitted one. But it did so in the same message in which it made its subsequently recanted representation that it received no goods or services under these FRNs. *See* Ex. D. Moreover, "USAC only disburses actual discount funding to a service provider after the applicant notifies USAC that the service provider has begun delivering the supported services, and the service provider submits an invoice." *In re Changes to the Board of Directors of the Nat'l Exchange Carrier Assoc.*, 97-21 (FCC Sept. 21, 2000) (the "September 21, 2000 Order") at 2, n.9.

Premio acted in a commercially reasonable manner by issuing the invoices when it completed and tendered the servers, and could not predict that LAUSD would subsequently wrongfully refuse to accept them. Put simply, Premio did everything it was supposed to do under this E-rate contract, and it deserves the compensation for which it contracted, both from LAUSD and USAC.

4. Alternative Request For Discretionary Waiver

In the alternative, if USAC continues to conclude that Premio violated an FCC rule in connection with the disbursement of funds for FRNs 238460 and 238465, Premio respectfully requests that USAC exercise its discretion to waive the rules violation. *In re Changes to the Board of Directors of the Nat'l Exchange Carrier Assoc., Inc.*, FCC 97-21 (FCC Oct. 8, 1999) (granting, on its own motion, a one-time limited waiver of four FCC rules pertinent to E-rate, and noting that regulations not required by statute may be waived in appropriate circumstances "and must be waived where failure to do so would amount to an abuse of discretion"). Premio has acted in good faith during the course of this investigation, and requests a waiver on either or both of the following two grounds:

a. Still Willing To Deliver Remaining 98 Servers

As it has explained before, Premio has always been willing, and remains willing, to provide the remaining servers to LAUSD, or to any E-rate participant designated by USAC. In fact, in April 13, 2005 correspondence with USAC, counsel for LAUSD proposed that it would accept the remaining machines "and will put them to use as appropriate, taking into account the fact that they are a few years old at this point." Ex. C, at 57.

The servers are more than five years old at this point, but they are not useless. Premio respectfully requests that instead of dealing with this situation by taking back 89% of the compensation that served as consideration for Premio to manufacture these machines in the first place, that USAC instead allow Premio to install these servers, which it expended time and resources to build, and which it has always tried to deliver pursuant to the terms of its contract with LAUSD. This solution—allowing Premio to install the servers at an E-rate school in need instead of leaving them to sit on a palette in Premio's warehouse—is more consistent with the program's goals of promoting universal service than the alternative reached by the Decision.

b. Financial Hardship

As USAC is aware based on its discussions with Premio and U.S. Attorney Dick Cohen, Premio is the subject of an investigation by the U.S. Attorney's Office. This investigation is based on the actions of one former Premio employee, Steve Newton, who has been indicted in the Northern District of California for actions related to E-rate programs *unrelated to Premio's dealings with LAUSD*.¹⁴ The U.S. Attorney's investigation does not relate to alleged wrongdoing in Premio's E-rate contracts with LAUSD. However, during the course of this investigation, Wayne Yee, a Financial Fraud Investigator for the Civil Division of the U.S. Attorney's Office in the Northern

¹⁴ See *U.S. v. Video Network Communications, Inc. et al.*, No. CR 05-00208 (N.D. Cal. April 7, 2005).

District of California,¹⁵ reviewed Premio's financial information. Premio understands that Mr. Yee concluded not only that Premio is facing financial hardship, but that the financial hardship Premio is facing is severe.

Premio respectfully requests that to the extent USAC has not done so already, it contact Mr. Yee regarding his analysis of Premio's financial hardship condition. Premio also asks that USAC exercise its discretion to reduce the amount it would otherwise order Premio to pay in view of the financial hardship Premio would experience from having to do so.

5. Entitlement to Reduction of \$716,638.40 for E-Rate Funds For FRN 260296

Premio also had an E-rate contract with LAUSD for funding year 2000. The FRN for this contract is 260296. LAUSD has always represented to USAC—accurately—that “Premio did meet its obligations and provided LAUSD goods and services under FRN 260296.” Ex. D, at 062. USAC still owes Premio \$716,638.40 in E-rate funding for these goods and services.

The August 4, 2004 FCC Order eliminated the E-rate offset provisions. Section 3716(b) of Title 31 of the United States Code requires that before collecting a claim by administrative offset, an agency must adopt or prescribe certain regulations which, in light of the August 4, 2004 Order, the FCC does not appear to have adopted or prescribed. Nevertheless, USAC has declined to pay Premio the E-rate funds owed for FRN 260296 while its investigation was pending. USAC also has not paid the outstanding Premio invoices for FRN 260296 since August 10, 2005 when it issued the Decision at issue, nor did the Decision take into account that Premio is entitled to \$716,638.40 in E-rate funds from USAC when it set the amount it ordered Premio to repay. Premio requests that, on appeal, USAC reduce the amount of any recovery it orders Premio to pay for FRNs 238460 and 238465 by the amount USAC owes Premio for FRN 260296, which is \$716,638.40.

Conclusion

For the reasons explained above, the Decision ordering the recovery of funds from Premio was improper. Premio requests that USAC reverse its decision to order the recovery of any funds from Premio, either because USAC now agrees that recovery from Premio would be improper, or based upon the permissible exercise of USAC's discretion given the unique circumstances of this case.

¹⁵ Mr. Yee's contact information is: 450 Golden Gate Ave., 10th Floor; San Francisco, CA 94102; (415) 436-6989.

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In the alternative, Premio requests that:

- USAC correct the ostensible mathematical error in its fund recovery order for FRN 238460;
- exercise its discretion to reduce the amount of any recovery ordered against Premio based upon Premio's continued willingness to install the remaining servers at any E-rate school specified by USAC, and/or its condition of financial hardship; and
- order that any amount Premio must repay for FRNs 238460 and 238465 be reduced by the amount USAC owes Premio for FRN 260296, which is \$716,638.40.

If I can provide any additional information that would aid in your assessment of Premio's appeal, please do not hesitate to let me know. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Paul J. Loh', with a large, stylized initial 'P' and 'L'.

Paul J. Loh
Counsel for Premio Computer, Inc.

cc: Elizabeth I. Rogers
Kristy Carroll